State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

June 12, 2015
PR 15-30

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. Newport School Department

Dear Ms. Levin:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of Access/Rhode Island against the Newport School Department ("School Department") is complete. You allege the School Department violated the APRA when it:

1. failed to provide certification that it had received APRA training pursuant to R.I. Gen. Laws § 38-2-3.16;
2. failed to timely respond to MuckRock's APRA request for written procedures (29 business days), see R.I. Gen. Laws § 38-2-3(e); and
3. failed to maintain APRA procedures/failed to post APRA procedures on its website, see R.I. Gen. Laws § 38-2-3(d).

In response to your complaint, we received a substantive response from the School Department's legal counsel, Neil P. Galvin, Esquire, as well as an affidavit from Superintendent Colleen Burns Jermain. Mr. Galvin argues that Access/Rhode Island lacks standing to raise the allegations concerning an untimely response to MuckRock's APRA request and that allegation nos. 1 and 3 "do not involve denial of access to public records[, and as such t]here are no provisions in Title 38, Chapter 2 that relate to remedies or rights or ramifications for non-compliance in relation to the allegations cited." Likewise, the Superintendent denies that the School Department violated the APRA since: (1) the School Department timely extended the time to respond to MuckRock's APRA complaint, (2) as of the date your complaint was filed had provided certification to the Department of Attorney General, and (3) as of the date of your complaint had created and posted its APRA procedures on its website.

You provided a rebuttal to this response dated January 30, 2015. Additional relevant facts will be discussed below.

At the outset, we observe that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a violation has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the School Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

With respect to Mr. Galvin's arguments that Access/Rhode Island lacks standing to file the instant complaint, we addressed this issue in a related complaint and our conclusion applies equally to this case. See Access/Rhode Island v. West Warwick School Department, PR 15-24. As such, we review this complaint solely on the basis of this Department's independent statutory authority. R.I. Gen. Laws § 38-2-8(d). Additionally, although Mr. Galvin contends that allegation nos. 1 and 3 do not involve denying access to records, and therefore, the APRA provides no remedy, we simply do not agree with this argument. See R.I. Gen. Laws § 38-2-8(b)("if the attorney general shall determine that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief"); § 38-2-9(d)(imposing fines for a "knowing and willful violation of this chapter" and for a public body found to have "recklessly violated this chapter"). Accordingly, we reach the merits of your complaint.

Rhode Island General Laws § 38-2-3.16 provides that:

> "[n]ot later than January 1, 2013, and annually thereafter, the chief administrator of each agency and each public body shall state in writing to the attorney general that all officers and employees who have the authority to grant or deny persons or entities access to records under this chapter have been provided orientation and training regarding this chapter."

In this case, the School Department claims it provided certification to the Department of Attorney General supporting its assertion that three (3) individuals received training in accordance with R.I. Gen. Laws § 38-2-3.16. Our review of this documentation, however, finds that none of these certifications were received by this Department prior to January 1, 2014, as required by R.I. Gen. Laws § 38-2-3.16, and none of these individuals received APRA training prior to January 1, 2014 (one received training on January 9, 2014). Since the School Department failed to submit evidence that an appropriate employee had received training prior to January 1, 2014, we conclude it violated the APRA. Id.

We also conclude that the School Department failed to maintain written APRA procedures and, as a consequence, these procedures were not posted on the School Department's website. The APRA provides that "[e]ach public body shall establish written procedures regarding access to public records[.]' R.I. Gen. Laws § 38-2-3(d). Effective September 2012, "a copy of these procedures shall be posted on the public body's website if such a website is maintained and be made otherwise readily available to the public." Id.

Here, in response to MuckRock's May 27, 2014 APRA request inquiring into whether the School Department maintained "written APRA procedures," the School Department acknowledged in an e-mail dated May 28, 2014 that the School Department did not maintain written procedures. Although the School Department has submitted evidence that it adopted written procedures in October 2014 and subsequently posted these written procedures on its website, the failure to do so earlier violated the APRA. Id.

Lastly, you claim that the School Department's response to MuckRock's April 27, 2014 APRA request was untimely. The APRA provides that:

> "[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. Any such explanation must be particularized to the specific request made. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body." R.I. Gen. Laws § 38-2-3(e). See also R.I. Gen. Laws § 38-2-7.

The School Department contends that it timely responded to MuckRock's April 27, 2014 APRA request when it timely (within ten (10) business days) extended the time to respond in accordance with R.I. Gen. Laws §§ 38-2-3(e) and 38-2-7(b). Indeed, the evidence demonstrates that on April 27, 2014, MuckRock made an APRA request to the School Department, and on the tenth (10th) business day, the School Department responded, inter alia, that it "would sincerely appreciate a short extension." The School Department subsequently indicated by e-mail dated May 28, 2014 that it did not maintain the requested documents. Such a timeframe, i.e., extending the time within ten (10) business days of MuckRock's APRA request and responding to the APRA request within a total of thirty (30) business days, represented a timely response in accordance with the APRA.

Your January 30, 2015 rebuttal takes no issue with the School Department's assertion that it provided a timely response; instead, your rebuttal claims that the School Department's assertion of an extension was not appropriate. In particular, your rebuttal relates:

> "an extension of time to respond to a request is authorized only if the public body 'can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.' R.I.G.L. 38-2-3(e). In this instance, however, there were no records to provide, and thus there was no basis for seeking an extension of time to respond to the request (and thus delay the time for acknowledging its failure to have written procedures)."

Respectfully, there is no question that the issue you raise in your rebuttal, i.e., the appropriateness of the School Department's extension, differs from the issue raised in your complaint and this Department's acknowledgment letter, i.e., the timeliness of the School Department's response. For the reasons discussed above, we have already concluded that the School Department's response was timely.

With respect to this newly raised issue, consistent with this Department's precedent, we decline to address an issue that was first raised in a rebuttal and that a public body has not had the opportunity to address. See e.g., Boss v. City of Woonsocket's School Board Review Committee, OM 14-19; Mudge v. North Kingston School Committee, OM 12-35 (Department of Attorney General will not consider allegations first raised in rebuttal). Clearly, the School Department has had no opportunity to address this issue and our January 5, 2015 acknowledgment letter made clear that "[y]our rebuttal should be limited to the matters addressed in the response and should not raise new issues that were not presented in your complaint or addressed in the response." Since the record demonstrates that the School Department extended the time to respond to MuckRock's April 27, 2014 APRA request well before your December 2014 APRA complaint was filed with this Department, the issue concerning the appropriateness of the School Department's extension could have been, but was not, raised in your APRA complaint. Accordingly, it would be improper for us to decide a matter first raised in your rebuttal where the School Department had no opportunity to present its arguments or evidence to this Department, particularly when this issue could have been timely raised.[1]

Additionally, your conclusion that because no responsive records exist, the School Department had no basis to extend the time to respond lacks a sufficient factual basis. Simply because documents are not ultimately located has no bearing on whether a public body could demonstrate the appropriateness of an extension due to "the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records." R.I. Gen. Laws § 38-2-3(e). Whether the School Department's extension fell within one or more of these categories could only be determined after reviewing all the facts and arguments related to this issue, which for the reasons discussed above, have not been presented to this Department. Since this issue was not raised until your rebuttal, and since we have not had the benefit of the School Department's response, we deem this issue, i.e., the appropriateness of the School Department's extension, to not be properly before this Department.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen.

[1] Additionally, if we required a public body to respond to an issue post-rebuttal–when the issue should have been corrected within five (5) business days of our acknowledgment letter– we would be needlessly extending the timeframe within which open government cases are resolved by seeking a further response from a public body and presumably allowing any additional rebuttal from you limited to the issues addressed, once again, in the public body's response. To further delay the resolution of other open government cases when the issue could have been clarified or corrected at the earliest possible juncture, does not serve the public interest. See R.I. Gen. Laws § 38-2-8(b); Access/Rhode Island v. West Warwick School Department, PR 15-24.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). In this case, for the reasons discussed in West Warwick School Department, PR 15-24, we have reviewed this matter pursuant to the Attorney General's independent statutory authority, and accordingly, any complaint or further action must be initiated by this Department on behalf of the public interest and not the Complainant. R.I. Gen. Laws § 38-2-8(d). A court "shall impose a civil fine not exceeding two thousand dollars ($2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars ($1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d).

In this case, we find neither remedy is appropriate. The School Department has submitted its APRA certification to this Department, and as discussed earlier, the evidence establishes that a School Department employee received APRA training in January 2014. Additionally, the School Department has promulgated APRA procedures and posted these procedures on its website. Although not determinative, all these remedial actions occurred prior to the filing of the instant complaint and even your rebuttal acknowledges that this type of "after-the-fact compliance may be a factor to consider in determining appropriate remedies." Accordingly, based on the totality of circumstances, we find insufficient evidence to support a willful and knowing, or reckless, violation.

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Whether Access/Rhode Island would have standing to do so is, of course, a decision within the jurisdiction of the Superior Court and not this Department. This finding does serve as notice to the School Department that its omissions violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or reckless violation. We are closing this file as of the date of this correspondence.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

M. W. Field

Michael W. Field
Assistant Attorney General

Cc: Neil P. Galvin, Esquire